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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 597

THEODORE CUFF and ELIZABETH CUFF,

Petitioners,

vs.

JOHN HABA, PLAINTIFF SUBSTITUTED BY NORMAN VAN BOGART,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

The petitioners herein pray that a writ of certiorari issue to review the final judgment of the Supreme Court of Ohio rendered on the 14th day of July, 1964, and of the Ninth Judicial District Court of Appeals, of Summit County, Ohio made on the 19th day of February, 1964.

OPINIONS.

The opinions of the Ninth Judicial District Court of Appeals of Summit County, Ohio and the Court of Common Pleas of Summit County, Ohio are set forth in the Appendix hereto at pp. 18-25 and 14-17, respectively.

JURISDICTION.

On June 10th, 1964 the Supreme Court of the State of Ohio, overruled a motion for an order directing the Ninth Judicial District Court of Appeals of Ohio, to certify its record to the Supreme Court of Ohio, and dismissed an

Appeal from that same court for the reason *"No debatable Constitutional question involved in said cause"*; and on July 14th, 1964 the court further denied an application for reconsideration of the motion aforementioned. One of the several questions involved was the Question of conflict of decisions, where the eight District Court of Appeals rendered a decision in conflict with the decision of the Ninth District Court of Appeals of this state upon the same question involved in this cause, namely, the application of the principles of estoppel and laches to a municipal corporation.

The Supreme Court of Ohio rejected the petitioners' contention based upon the laws of the State of Ohio, and the laws of the United States.

The decision of the Supreme Court of Ohio, is reviewable upon petition for a Writ of Certiorari, under 28 U. S. Code Annotated, Sec. 1257, Paragraph 3.

ISSUE INVOLVED.

1. Defendants-Appellants Cuff, a married couple, contend that the principles of equitable estoppel and laches apply as against a municipal corporation or township in the enforcement of its zoning ordinance so as to grant them permanent injunctive relief and to allow for the continued residential use of a four room building built after permit granted but not in conformity with submitted plans where said building has been in continued residential use for approximately nine years and built by Appellants' predecessor in title, and not inspected during construction by the zoning inspector, and not complained about or objected to by said municipal corporation until after said period of time had elapsed, said present owners, Appellants herein, being bona fide purchasers for value without notice and having occupied said building as a resi-

dence themselves, and said building presently being used as a residence.

2. Is not the enforcement of said municipal zoning ordinance against petitioners a taking of property without due process of law further considering the fact that no compensation has been paid for said taking and, therefore, unconstitutional?

3. Does such zoning ordinance in forbidding the use of said structure, where it is admitted that there is no question of nuisance involved, bear a substantial relationship to the public health, morals, safety and welfare?

4. Can a court say unequivocally that a residential structure, used only as a residence for approximately nine (9) years, shall not be further used for said residential purpose and at the same time fail to set out specifically to what use said premises can be put after request made?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional Sections involved are contained in Article XIV, Section 1, of the amendments to the Constitution of the United States, and the Constitution of the State of Ohio, Article I, Section 16.

Constitution of the United States, Amendment XIV, Section 1.

> 1. All persons born or naturalized in the United States, and subjects of the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunity of Citizens of the United States, nor shall any state deprive any person of Life, Liberty, *or property without due process of law*, and deny any person within the Jurisdiction *the equal protection of the law*.

Constitution of the State of Ohio, Article I, Section 16.

16. All courts shall be open, and *every person, for any injury done him in his land, goods,* person or reputation shall have remedy, by the courts of law, *and shall have justice administered without denial or delay,* suits may be brought against the State, in such courts and in such manner, as is provided for by law.

STATEMENT OF THE CASE.

The Petitioners, Theodore Cuff and Elizabeth Cuff, are husband and wife residing in Twinsburg Township, Summit County, Ohio.

Respondents, Norman Van Bogart, is the duly appointed and qualified Building Inspector of Twinsburg Township, Summit County, Ohio.

The property in question is a Four Room House, or dwelling, which was constructed by the Farrows under a permit to them issued by the Zoning Commission of Twinsburg Township, Summit County, Ohio on May 7th, 1953 to be constructed on lot with the frontage of 153.22 ft. and depth of 1469 ft.

In 1951 a zoning ordinance was adopted by the electors of Twinsburg Township, Summit County, Ohio.

The Farrows were the predecessors in title of the premises in question, and made application for a building permit on the 7th day of May, 1953 to the Zoning Commission of Twinsburg Township, Summit County, Ohio, to construct a dwelling for residential purposes upon the premises in question, and now owned by your petitioner, and the Zoning Commission of Twinsburg Township, did cause a permit to be issued to the Farrows for the construction of said dwelling on said premises, the Farrows, thereafter building a structure, or dwelling, thereon, but not in conformity to the plans. The Farrows occupied said

structure, or dwelling as a residence for 2 years, or until 1956 when it was sold to the petitioners.

In September 1956 your petitioners purchased said premises with the structure or dwelling thereon, constructed by the Farrows, for a good and valuable consideration passing from your petitioners to the Farrows, without notice that the structure, or dwelling, on the premises was not constructed in conformity with the plans. Said structure was then rented for occupancy as a residence and the tenants continued to occupy said structure, or dwelling for residential purposes until 1958, when your petitioners moved in and occupied said structure or dwelling as a residence for approximately 3 years until 1961.

Your petitioners while occupying said structure, or, dwelling, made application for a variance of the zoning restriction on said premises, and said variance was allowed, and your petitioner commenced and did construct a new dwelling on the front of the lot, said lot being 153.22′ x 1469′ and large enough to contain the two houses, in which they now reside, moving into said premises in 1961.

On March 26th, 1962 an action was commenced in the Court of Common Pleas of Summit County, Ohio, praying that the petitioners "be perpetually enjoined from using said original structure for residence purposes; that this Court order the petitioners to remove, tear it down and abate such unlawful structure."

Said action was tried in the Court of Common Pleas of Summit County, Ohio, and Judgment was rendered in favor of your petitioners, as set forth in the Journal Entry set out in the Appendix hereto, but on appeal, the Court of Appeals reversed the trial court and on further appeal to the Ohio Supreme Court it failed to allow the case to be heard, thus affirming the Court of Appeals.

REASONS FOR GRANTING A WRIT OF CERTIORARI.

Your petitioners contend that by right, and by the provisions set forth by law, they are entitled to a Writ of Certiorari in the within cause for the following reasons:

Rule 19(b) of the United States Supreme Court indicates the Court will take jurisdiction in the following types of cases:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter."

We have such a conflict in the instant case with that of *Kilko v. Cleveland*, 60 O. L. A. 561, 136 N. E. 2d 468, where the court said:

> "The principles of equitable estoppel applies to municipal corporations as well as to individuals."

Your petitioners further contend, that since the Township Zoning Commission, and their inspectors have sat idle for 9 years and done nothing until 1962, that the Township of Twinsburg, its Zoning Commission and the Zoning Inspectors were Guilty of Laches, and that the principle of equitable estoppel applies.

The Eighth District Court of Appeals rendered the decision in the *Kilko* case and the Ninth District Court of Appeals has denied the application of the same principles of law in the instant case. (It is pertinent to point out that members of the Ninth District Court of Appeals for Summit County, Ohio sitting by designation rendered the decision in the *Kilko* case for the Eighth District Court of Cuyahoga County, and they are now failing to be bound by their own decision in the same type of case.)

The Courts of Ohio have applied the principle of equitable Estoppel to Municipal Corporations as well as to individuals.

See also *State, ex rel. Simmons vs. Walker et al.*, 145 Ohio State 121 at page 127.

In the above case a writ of Mandamus was allowed, ordering the pension board to reinstate the pension of a police officer who had decided to retire and had received a pension for 17 months. Also at page 564 of the *Kilko* case the Court says as follows:

> *"That the circumstances may be such that the private rights of individuals are of more persuasive force in a particular case than the rights of the public, and in such cases it is found to be more just to enforce an equitable estoppel against the municipality rather than to permit it to retake possession of such Street."*

The Theory of Equitable Estoppel is discussed also in Vol. 20, *O. J.* 2nd sec. 80 wherein the rule that Estoppel applies against a Municipal Corporation is reiterated at pages 566-567, and we find:

> "The true rule seems to be that the application of the doctrine of estoppel in Pais to Municipal Corporations is confined to cases in which *they have the power to act or contract, in such cases, they may estop themselves by conduct, Silence or Acquiesence in the same way as natural persons.*"

Also see Section 82 of the same work at page 569 which lays down the rule of Estoppel as being effective also against Townships.

Estoppel against Municipal Corporations is further supported by the following cases:

> *People vs. Rock Island*, 215 Illinois 488, 495, 74 N. E. 437, 440; *Dallas vs. Rosenthal*, 239 S. W. 2nd 636.

The court in this case of *Dallas vs. Rosenthal*, 239 S. W. 636, 2nd Ed. at Branches 8 and 9 of the Syllabus said:

> "8. In exception cases, a Municipality, even in the exercise of Governmental Functions, *may be sub-*

jected to the same rules of Equitable Estoppel as are individuals where rights and Justice require it.

"9. One seeking Equity must do equity by proceeding seasonably while his adversary has fair opportunity and means of protection, the maxim being applicable to the State, its divisions and instrumentalities when seeking equitable relief."

The following may be found in the case of *Highland Park vs. Marshall,* 235 S. W. 2nd 658, with Special reference to branches 7 and 8 of said Syllabus:

"7. In action by town to enforce the zoning ordinance defendants, *who as subsequent owners acquired property without knowledge that accessory building enlargement when made, violated the ordinance, were not lawfully chargeable with notice of what building inspector's records reflected or failed to reflect with reference to a permit, and non-conforming use would not be limited to use to which accessory building was put prior to enactment of the ordinance.*

"8. Where town officials acquiesced in completed accessory *building with regard to alterations made 18 years previously without a building permit, and alterations caused building to violate zoning ordinance, in action to enforce the zoning ordinance, a presumption would obtain that after such lapse of time that extension was consistent with the ordinance, and not that there was a violation,* and alterations would be construed as extension of a use to building to which was designed for such non conforming use at time ordinance was passed."

The case herein cited is almost directly in point with the question before this Court, as it allows for no relief to the City where the City sat silent for 18 years respecting a garage building being used for private residence, even though there was another residential building on the premises involved.

And the court will find in the case of *City of San Angelos vs. Deutch*, 91 S. W. 2nd 308, 126 Texas 532, where the Court said quoting the case of *Cawthon vs. City of Houston*:

> "it will be seen from the above opinion that in Texas the doctrine of Estoppel not only applies generally when the City is acting in a Proprietary capacity *but also by reason of negligence or unauthorized acts of officers, where the equities of the situation deem it.*"

Then in the case of *District of Columbia, et al., vs. Cohill*, 54 Fed. Rep. 2nd 453, the court has this to say:

> *"Owner having made large expenditures to improve garage in residence district relying on building inspectors' permit, District held estopped from revoking certificates of occupancy."*

After careful reading of the above cited cases the Court will find that the identity of this case at bar, and the case cited are basically alike, and founded upon the same principles.

The court in further discussing the *Cohill* case said again:

> "record did not disclose that permits had ever been issued to owner of building for use of any part of premises as garage, but it appeared that from 1911 and continuously thereafter first floor of building was openly used by successive tenants for garage and garage purposes without objection. In 1926 plaintiff purchased property and applied to building inspector for a permit to fireproof and repair premises and for a certificate of occupancy of first floor for use as a garage, and thereafter such permit was issued, whereupon plaintiff expended about $6,000.00 in execution of repairs and improvements and leased first floor for garage purposes."

It is believed that the cases cited support the contention of your petitioner, and bear directly on the issues of equitable Estoppel against the Township, which is a governmental body, and are authority for the granting of a Writ of Certiorari, by this Court in the instant case.

Your petitioners further contend that the theory of laches is applicable to the instant case, in addition to the law of equitable estoppel, and that there are sufficient grounds for the granting of the writ herein.

The question of laches is clearly set forth in 30 *Corpus Juris Secundum* at page 521 and following, under subject of Equity, beginning with section 112, wherein it is stated:

> "Laches is such a neglect or omission to assert a right as taken in connection with lapse of time and other circumstances causing prejudice to the adverse party, theretofore operating as a bar in a court of equity."

The Courts have also defined laches *as an unreasonable delay, neglect to do a thing or seek to enforce a right at a proper time or the neglect to do what in law should have been done for an unreasonable and unexplained time,* and under circumstances permitting diligence. The doctrine of laches proceeds upon the question of the inequity of permitting a claim to be enforced where inequity is founded upon some change in the conditions or relations of the property or the parties interested.

Your petitioners contend that the case at bar is one within the law as set forth in the definitions of the term of laches.

It is the further contention of your petitioners that the case of *Akron vs. Chapman,* 160 Ohio State page 382 decided by the Supreme Court of Ohio, specifically applies

to the instant case regarding the taking of property without due process and compensation. The court held in this case thus:

> "The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right."
>
> "The right to continue using one's property in a lawful manner and in a manner which does not constitute a nuisance * * * is within the protection of Section 1, Article 14, amendments to the Constitution of the United States, and Section 16, Article I, of the Ohio Constitution, which provides that *no person should be deprived of life, Liberty or property without due process of Law.*"

It is the belief of your petitioners that if the respondent is allowed to enforce the said zoning ordinance, then the use of the property will be annihilated completely as to petitioners.

To allow the Zoning inspector of the Township of Twinsburg, Summit County, Ohio to enforce the zoning ordinance after sitting idle for nine years is, in fact, inequitable, and is taking of property without just compensation from one who is the innocent purchaser for value without notice, in violation of your petitioners' constitutional rights, and is a further invasion of their property rights, by taking their property without any compensation.

The case at bar is one where the petitioners' predecessors in title contracted with the Township of Twinsburg, Summit County, Ohio, through its lawful and duly appointed Zoning Commission to construct a dwelling house, which contract was legal at its inception.

The said predecessor in title of the premises in question had a lawful right to contract with the Zoning Com-

mission of Twinsburg Township, Summit County, Ohio and the subject matter of the contract was legal, being neither malum per se or malum prohibitum.

The failure of the township inspector, to make proper inspection of the building while it was under construction, was no violation of the zoning ordinance by the petitioners. It was not the duty of your petitioners to see that the building was being built in conformity to plans submitted during the construction of said Building (dwelling) while under construction, but it was the sole duty of the zoning inspector at the time of the construction of said dwelling to voice any legitimate complaints and not to complain some nine years later that said dwelling was not constructed in conformity to plans, this being the case, the application of the doctrine of laches should be applied in this case.

The contract at its inception was not an ultra vires act, illegal, or malum prohibitum.

The case at bar comes within a number of doctrines of law as laid down by the courts: Laches, Equitable Estoppel, the Constitution of the United States, and the Constitution of the State of Ohio.

Therefore we urge the Court to allow a writ of Certiorari for the reasons herein set forth, and for the further reason that the Ninth Judicial District Court of Appeals of Ohio, and the Supreme Court of Ohio, have definitely failed to spell out, for what use, or purpose, the structure in question may be used.

Neither court setting out the permitted use of said structure, petitioners are left with a residential building restricted in use for such purposes, with actual permitted use unknown and undefined. It indeed is a white elephant.

It is a recognized principle of equity jurisprudence, that a court of equity will, after taking jurisdiction, de-

cide all issues and questions germane and inherent in the case. On application by petitioners, both courts have evaded the question of permissive use of the property. There has been no order to tear this building down, the order merely restricting its residential use. The justice of this case supports petitioners' application for a writ to decide this and the other questions raised in this case.

CONCLUSION.

Your petitioners contend that there has been gross discrimination by refusing petitioners the rightful use of their property, and that the laws of the State of Ohio have not been followed, all of which has deprived your petitioners of their rights granted by the Constitution of the United States, and the Constitution of the State of Ohio.

For the foregoing reasons the petition for a Writ of Certiorari, should be granted.

Respectfully submitted,

E. F. TRUNKO,

R. L. THOMPSON,

Attorneys for Petitioners.

APPENDIX.

FINDING OF THE COURT OF COMMON PLEAS, SUMMIT COUNTY, OHIO.

(Decided November 26, 1962.)

No. 232,986.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, SUMMIT COUNTY, SS:

JOHN HABA,

Plaintiff,

vs.

THEODORE CUFF, *et al.,*

Defendants.

FINDING.

COLOPY, *J.*:

The Court: Well, here is my reaction to this; and I am ready to tell you right now. The conditional order that pertains to the building of this dwelling, the last dwelling, is of no significance at all. Once he obtained a permit, and he did under the records, to build a building in variance with the zoning requirement as to frontage, and he acted upon it, you can't later—the Township can't later go ahead and restrict the privilege which they have already given him. They are estopped from doing so. He was entitled to rely upon the privilege or the permit granted, and you can't later withdraw that to his prejudice. That's a clear case of estoppel. It would be a clear case of estoppel, and you can't later vary that and attach significance to it that "You are supposed to remove some other building." I am quite sure of that.

Now getting back to the original requirement. You were supposed to—the building in order to conform with the 1951 zoning requirement would have to have 576 square feet. I doubt very much if this permit here to build a two-story structure can be considered as a permit to build the structure in question. I am inclined to doubt that. On the foundation the building and structure probably has enough square feet to conform to the building—or zoning of 1951, but this building was built in 1953. 1953. And if there was something wrong about that structure, if it was in violation of the zoning in some way, this is a pretty late hour of the day to come in and assert it nine years later. I am not saying that it is, that that little house is in conflict with the zoning laws, I am not sure that it is, even though it hasn't at this time quite 576 square feet. Nevertheless, on its foundation it would conform.

She says they haven't finished it because they have been approached by the authorities up there that they were not in compliance with the laws and they haven't done it for that reason. I suspect there is some truth in that. I am inclined to think there is some truth in what she says, that that's the reason it hasn't been finished.

But you run head on into two principles of equity which you lawyers are as familiar as I am. One is the law of estoppel. The law of estoppel. You can't amend the permit once he has acted upon it and he has built under it. You can't then limit, the privilege of building to his prejudice after he has acted. And so for that reason you can't amend your zoning permit.

You couldn't do it for other reasons too. You couldn't do it without him agreeing to it, in my opinion, because as those minutes indicate privilege was granted upon formal action which in no way was conditioned, and apart

from the law of estoppel I don't think you would be able to do it.

I won't spend any more time on it, any more time on that aspect of it, because this lawsuit relates to that little structure which was built back in '53. I am not—I don't know whether it complied with the '51 zoning laws or not. It is hard to say. I would think the City would be clearly foreclosed from taking at this time any formal action to prevent the use of that building as a dwelling because of the principle of laches.

The City was bound—you are bound to assert your rights within a reasonable time. I don't know what the reproduction cost of that building would be. Probably $1,000. I don't know. But we have had more or less trouble up there in Twinsburg, and it is unfortunate.

You've got the possibility of Twinsburg growing into a nice community. You've got a lot of industry. And all you need to do is have a few stupid people that want to live in shacks, and that will prevent the town from becoming a good town. I would doubt very much if it is to your interest to maintain a shack in the rear like that.

That's what you really have, isn't it, pretty much of a shack?

The Defendant: I wouldn't consider it a shack. It is painted, well kept, in good order. It is painted every couple of years. The block is painted and all the other parts are painted. It is kept in good shape, kept up in good shape. It doesn't leak, you know. It has two doors—it has three doors, two in the front and one in the rear, and it is in very good shape.

The Court: If it is something that is marring the appearance of the community you ought to get rid of it, but I can't compel it as a matter of law.

The Court finds on all issues in this case in favor of

the defendants, both on the petition and answer, and the cross-petition and answer to the cross-petition.

Mr. Trunko: Thank you, your Honor.

The Court: That's all.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS OF SUMMIT COUNTY.

(Decided July 27th, 1963.)

This cause came on this 22nd day of November, 1962 for hearing on the petition of the plaintiff, the answer and Cross Petition of the defendants, and the answer of the plaintiff, to the Cross Petition, of the defendants. And the evidence and the attorneys of the plaintiff, and the attorneys for the defendant being present and was submitted to the court; on consideration thereof, the court finds on the issues joined, for the defendants, and against the plaintiff, both upon the petition of the plaintiff the answer and cross petition of the defendants, and the answer to the cross petition of the defendants.

The court finds that at the conclusion of the trial, the plaintiff filed a motion that the court state in writing the conclusions of fact found separately from the conclusion of law; and the plaintiff having later withdrawn in open court his motion that the court state in writing its conclusion of fact found separately from its conclusion of law; it is therefore considered and decreed, that the plaintiff, Norman Van Bogart, the duly acting and qualified zoning inspector of the Township of Twinsburg, and John Haba, the duly appointed acting and qualified assistant zoning inspector of the Township of Twinsburg, and their agents and em-

ployees, be and hereby are perpetually enjoined and restrained from in any way interfering with the defendants in the lawful use, occupancy and repair of said dwelling now upon the premises of the defendants herein, for dwelling purposes or for such use that is comparable to the use of a dwelling in accordance to the zoning ordinances of the Township of Twinsburg.

It is the further order of the Court that the plaintiff herein pay the cost of said proceedings, for which judgment is rendered herein in favor of the defendants, for which an execution may issue.

To all of which plaintiff excepts.

S/STEPHEN C. COLOPY,
Judge.

OPINION OF THE COURT OF APPEALS, SUMMIT COUNTY, OHIO.

(Decided December 11th, 1964.)

HUNSICKER, *P. J.*

John Haba, on March 26, 1962, as assistant zoning inspector for Twinsburg Township, Summit County, Ohio, filed an action against Theodore Cuff and Elizabeth Cuff, praying that Mr. and Mrs. Cuff be perpetually enjoined from using a structure on lands belonging to them for residence purposes, and for an order of the court that Mr. and Mrs. Cuff "tear down and abate such unlawful structure." In this opinion this building will be referred to as the structure.

During the pendency of the action, Norman Van Bogart, the zoning inspector for the township, was substituted as the plaintiff herein.

Van Bogart says that there is on the Twinsburg Township land of the Cuffs a building used for residential purposes contrary to the zoning resolution of the township, and no certificate of occupancy was ever given for such structure. He further says he brings the action pursuant to Sec. 519.24, R. C., to enjoin, remove, or abate, the structure.

By way of amended answer and cross-petition, Theodore Cuff and Elizabeth Cuff say they are the owners of land on Twinsburg Road in Twinsburg Township, on which is a "building twenty-four by twenty-four (24 x 24) feet, which building is now, and always has been, used for residential purposes from the time of its original construction and prior to the adoption of any zoning resolutions adopted by" the township. The Cuffs further say that the building in controversy "has been at all times used for residential purposes as a single dwelling prior to and after the adoption of the zoning resolution by Twinsburg Township."

Other allegations in the answer deny that the structure in issue is subject to the zoning restriction.

By way of cross-petition, the Cuffs admit that they are the owners of land upon which the structure at issue is built and used for residential purposes; that there is another residential building on the lot in which they live; and that both buildings were constructed to conform to the law and the zoning restrictions.

They ask for a permanent injunction to prevent the zoning authorities from interfering with them in the lawful use of both dwellings.

An answer was filed to the cross-petition, and a reply filed to such answer. The issues were made under such pleadings.

The trial in the Common Pleas Court resulted in a

judgment perpetually enjoining the zoning authorities from in any way interfering with the Cuffs in the "lawful use, occupancy and repair of said dwelling * * * for dwelling purposes, or for such use that is comparable to the use of a dwelling in accordance to the zoning ordinances of the Township of Twinsburg."

From the judgment, an appeal on questions of law and fact is lodged in this Court. Additional testimony was presented by the parties to this Court by way of deposition.

Zoning was adopted in Twinsburg Township on May 22, 1951. No house thereafter could be built on Twinsburg Road in the township on a lot with less than 200 foot frontage. In 1953 the then owner of the land now involved herein, a Mr. Farrow, built the structure thereon without a permit. This structure failed to comply with the then-existing zoning law in at least two respects: first, the lot which was on Twinsburg Road had a frontage of only 153.22 feet; and, second, the structure that was built had a smaller square-foot area than the zoning law required for a residence property.

Nothing was done by the zoning authorities with reference to this structure for several years. The rear portion of such building was never completed, although a foundation was laid and studding erected, with a roof over such unfinished portion. This four-room structure was occupied as a home by Farrow and others, including the Cuffs and their children.

In 1959, the Cuffs applied to the zoning board for a zoning variance for the purpose of building a new home on the 153.22-foot lot in front of the then-existing structure which is now in dispute. This variance was granted by the Twinsburg Township Zoning Board of Appeals after two hearings—one on April 30, 1959, the other on May 12, 1959.

The minutes of the meeting of May 12, 1959, at which the variance and permit to build was granted, made no mention of an alleged offer by Cuff, or a requirement of the Zoning Board of Appeals, to remove or abandon the structure in controversy, or to make some use of it other than as a dwelling.

The Cuffs continued to occupy the structure until they completed their new home. It then remained vacant for less than two years, when the Cuffs rented it for residence purposes. Thereafter, a question arose as to the use to which the structure was put.

On November 30, 1961, the zoning board held a hearing, to which Mr. Cuff was ordered to appear. At such hearing the variance order of May 12, 1959, was amended "to grant the zoning certificate on condition that, after the house on the property be completed, the garage [in this action called "structure"] be used only for nondwelling purposes."

It is significant that the chairman of the Board of Zoning Appeals, when questioned in this case concerning the granting of the variance to the Cuffs to build their present residence, said:

> "I am sure that we would never have granted a variance had he said he was going to rent that building or have someone living in it, I grant you that."

It is certain that no condition was placed on this variance granted to the Cuffs at the hearing on May 12, 1959. That house has now been completed for several years. No change can be made with respect to that house at this late date, and no revocation of the order or change therein can affect such residence.

In this case, then, we have the following questions: first, Can a zoning board of appeals amend an order of

variance some years after an order is granted? second, Can a village be estopped to enforce a zoning violation which it has allowed to continue for many years? and third, What is the status of the structure that was erected on the Cuff property in 1953?

The powers of a township board of zoning appeals are set forth in Sec. 519.14, R. C. There is in such section no specific power to correct its order; however, the right of a board of zoning appeals to correct a clerical error has been recognized in New York in the case of *Eckerman v. Murdock*, 94 N. Y. S. 2d 557, 276 App. Div. 927. No Ohio case involving a factual question similar to the one we have in the instant case has been found. Ohio does, however, subscribe to the general rule that clerical errors in an administrative agency's records may be made to speak the truth. 1 *O. Jur.* 2d, Administrative Law and Procedure, Sec. 148, and authorities there cited.

The power to correct a record because of clerical errors should not be used, however, to change a previous order because hindsight makes it possible to see errors in judgment not apparent at the time of entering the original order, or in changing the order to conform to that which a board now wishes it had done.

The order that was changed in this case was no longer under the control of the appeal board. The new house had been built more than two years prior to the attempt to write into the original variance order that which the board was allegedly told would be done with the structure, then, and now, used as a dwelling. The board failed to make a condition of variance the abandonment of the structure as a dwelling.

The attempted order of change is not effective as to the Cuff property.

The structure built in 1953, without authority or per-

mission, and in violation of the zoning regulations, and occupied as a dwelling, is not a nonconforming use under Sec. 519.19, R. C. Whether it is under the township zoning regulation we cannot determine, because the complete zoning resolution is not before this court. See also: *State v. Pierce,* 164 O. S. 482.

We do have the question as to whether, under the facts of this case, the township is estopped to complain about the violation of its zoning regulations in so far as this structure is concerned. From 1953 until 1959 no complaint of any kind was made regarding the structure. Does such laches now preclude the enforcement of the zoning resolution?

This court, while sitting in the Eighth District Court of Appeals, said, with reference to the subject herein, that "The courts in Ohio have applied the principles of equitable estoppel to municipal corporations as well as to individuals." *Kilko v. City of Cleveland,* 60 Abs. 561, at p. 564. We there cited with approval the case of *Baxter, Trustee, v. Village of Manchester,* 64 O. App. 220, wherein the court said:

> "2. The doctrine of estoppel is applicable to municipal corporations where they have the power to act or contract, but is not applicable where the subject-matter of the contract is ultra vires, illegal or malum prohibitum."

Where a municipal corporation does not have the power to make a grant or give a licence, estoppel cannot be invoked by the one claiming against the municipality. *L. & N. Railroad Co. v. City of Cincinnati,* 76 O. S. 481. Estoppel has been effectively used against a municipality where the municipal corporation entered into a contract with an individual under a statute which was unconstitutional, but the subject matter of the contract was not ultra

vires, illegal or malum prohibitum. *City of Mt. Vernon, et al., v. State, ex rel. Berry*, 71 O. S. 428.

An annotation on the subject "Applicability of doctrine of estoppel against government and its governmental agencies," may be found in 1 *A. L. R.* 2d 338, *et seq.* A further collation of authorities on the subject "Right of municipality or other public authority to enforce zoning or fire limit regulations as affected by its previous conduct in permitting or encouraging violation thereof," may be found in 119 *A. L. R.* 1509, *et seq.*

The general rule, as found by the pronouncements of courts in other jurisdictions, is to the effect that a municipal corporation is not estopped from enforcing a zoning regulation because of a failure of the officers of such municipality to make timely objection to the violation of the zoning regulation. We believe this is the view that should be followed in Ohio, with respect to the zoning regulation before us. It must be remembered that zoning regulations are adopted under the police power; and, since such regulations carry a possible penalty for their violation, they are in that respect malum prohibitum.

A few of the cases which follow the general rule are: *Ferrante, et al., v. Board of Appeals of Northampton* (Mass.), 186 N. E. 2d 471; *City of Yonkers v. Rentways, Inc., et al.*, 304 N. Y. 499, 109 N. E. 2d 597; *Newton, et al., v. Town of Highland Park, et al.* (Texas), 282 S. W. 2d 266; *Gregory, et al., v. City of Wheaton*, 23 Ill. 2d 402, 178 N. E. 2d 358; *Flinn, et al., v. Treadwell, Bldg. Insp., et al.* (Colo.), 207 P. 2d 967.

It is our conclusion herein that the Township of Twinsburg is not estopped to enforce its regulations with respect to the violation by the Cuffs. They shall be enjoined from continuing to use the structure as a dwelling or from permitting it to be used as a dwelling.

A journal entry in conformity with this conclusion shall be prepared and submitted to this court. The appellees Cuff shall pay the costs of these proceedings.

Decree for appellant.

DOYLE, J., AND STEVENS, J., concur.

OPINION OF THE COURT OF APPEALS ON APPLICATION FOR RECONSIDERATION.

PER CURIAM:

An application for reconsideration of this matter was filed herein by appellees.

This court thereupon again examined the transcript of the evidence to see if there was any justification for the claim that the building designated in the opinion as a structure was, in fact, erected pursuant to a permit issued by the zoning authorities.

There is no such evidence contained in the transcript of testimony, nor are there any plans for such structure among the exhibits. The testimony conclusively shows that a permit to erect a duplex dwelling was issued to the Farrows, but such home was not built. This permit for a duplex dwelling was not, and could not be, a permit to erect the structure in dispute herein.

We have examined all of the claims raised by the application for reconsideration, and find them to be untenable. The application for reconsideration is denied.

A journal entry recording our conclusion will be prepared and filed by the court in accordance with the rules of this court.

HUNSICKER, P. J., DOYLE, J., AND STEVENS, J., concur.

JOURNAL ENTRY OF THE COURT OF APPEALS OF SUMMIT COUNTY.

(Decided February 25th, 1964.)

This case came on to be heard as an appeal on law and fact upon the appellant's amended petition, the appellee's amended answer and cross-petition, and upon the appellant's answer to said cross-petition and appellees' reply thereto, upon the record of the testimony presented before the Common Pleas Court of Summit County, Ohio, and the exhibits and upon additional testimony presented in the Court of Appeals in the form of depositions.

Upon consideration thereof this Court finds on the issues joined for the appellant and that the appellant is entitled to an injunction against the appellees from continuing to use the 22′ x 24′ structure as a dwelling, or from permitting it to be used as a dwelling as prayed for in his petition.

It is, therefore, ORDERED, ADJUDGED and DECREED that the appellees be perpetually enjoined from using the 22′ x 24′ structure as a dwelling or from permitting it to be used as a dwelling.

The appellees' application for reconsideration be and the same is hereby overruled.

It is further considered that the appellant recover from the appellees his costs herein expended, for which amount judgment is hereby rendered.

It is further ordered that this cause be and is hereby remanded to the Court of Common Pleas of Summit County for enforcement and execution, and such further proceedings as are provided by law.

Exceptions to appellees.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT.

(Decided July 14, 1964.)

This cause, here on appeal as of right from the Court of Appeals for Summit County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellants his cost herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

ORDER OF THE SUPREME COURT OVERRULING MOTION TO CERTIFY RECORD.

(July 14th, 1964.)

It is ordered by the Court that this motion is overruled.